MHS
Norristown, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ADVANCED DISPOSAL SERVICES
EAST, INC.
Employer

and Case 04-RC-123739

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 384
Petitioner

DECISION AND CERTIFICATION OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held April 16 and 17, 2014 and the Hearing Officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 60 for and 58 against the Petitioner, with one challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions[1] and briefs, has adopted the Hearing Officer's findings[2] and recommendations, and finds that a certification of representative should be issued.

[1] The Employer argues for the first time in its exceptions that Regional Director Dennis Walsh was without authority to issue his decision because the Board could not appoint him to his position on January 29, 2013 due to the invalidity of the recess appointments of two of the Board's three members and the consequent absence of a quorum. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). Assuming that this issue is properly before the Board, we find no merit to the Employer's contention. We find that the General Counsel was authorized to appoint Walsh as the Regional Director pursuant to the Board's order contingently delegating certain authorities to other NLRB officials. See Order Contingently Delegating Authority to the Chairman, the General Counsel, and the Chief Administrative Law Judge, 76 Fed. Reg. 73719 (Nov. 29, 2011). Further, the Board on July 18, 2014, in an abundance of caution and with a full complement of five Members ratified nunc pro tunc and expressly authorized the selection of Mr. Walsh.

1. We agree with the hearing officer's recommendation to overrule the Employer's objection related to the police presence on the morning of the election. In doing so, we note that, on the facts of this case, it does not matter who was responsible for calling the police to the Norristown facility because the officers' conduct did not interfere with the election. See *Vita Food Products*, 116 NLRB 1215, 1219 (1956).

2. We also agree with the hearing officer's recommendations to overrule the Employer's objections based on the conduct of Union business agent Chris O'Donnell and employee Christopher Lyons. The hearing officer correctly found that O'Donnell's statements and conduct, as well as some of Lyons', was not objectionable because there was no evidence that any employees witnessed that conduct or that it was disseminated to other employees. The lack of dissemination or evidence of employee witnesses supports a finding that, whether engaged in by an agent of the Union or by third-party employees, the conduct was not objectionable. See *Lockheed Martin Corp.*, 331 NLRB 852, 854-855 (2000) (party conduct); and *Antioch Rock & Ready Mix*, 327 NLRB 1091, 1092-1093 (1999) (third-party conduct).

3. The hearing officer correctly found that Lyons' argument with a fellow employee on the morning of the election does not warrant setting aside the election.

Finally, Regional Director Walsh on July 30, 2014 affirmed and ratified any and all actions taken by him or on his behalf from March 10, 2013 to July 18, 2014. See *Durham School Services*, 361 NLRB No. 66 (2014); *Pallet Companies, Inc.*, 361 NLRB No. 33, slip op. at 1-2 (2014); *ManorCare of Kingston, PA*, 361 NLRB No. 17, slip op. at 1 fn. 1 (2014). Accordingly, we reject the Employer's contention regarding the validity of Regional Director Walsh's appointment.

[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings. In addition, some of the Employer's exceptions allege that the hearing officer's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the hearing officer's decision and the entire record, we are satisfied that the Employer's contentions are without merit.

The argument between Lyons and his coworker, Benjamin Shackleford —who the credited evidence establishes had been friends for 20 years—would have reasonably been viewed by employees as a personal disagreement and not a threat of violence against employees who failed to support the Union. See *Bell Trans*, 297 NLRB 280, 280-281 (1989). Moreover, although there was evidence that a handful of individuals in the 120-employee unit heard about and discussed the incident, the Employer has not shown that it was widely disseminated. See *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984) (to be objectionable, third-party conduct must "create a general atmosphere of fear and reprisal rendering a free election impossible"). Finally, to the extent there is evidence that the argument was characterized as a "fight" when discussed among other employees, this evidence is insufficient to sustain the objection because the argument was conveyed erroneously and out of context by employees not involved in or witness to the actual incident. See *ManorCare of Kingston PA, LLC*, 360 NLRB No. 93, slip op. at 1-2 (2014).[3]

4. Finally, the Employer argues that the conduct of O'Donnell, Lyons, and unnamed actors, considered cumulatively, warrants setting aside the election. We find this exception without merit. Whether considered individually or cumulatively, the

[3] Member Miscimarra agrees that employees would not have reasonably viewed Lyons' conduct during his argument with Shackleford as a threat of violence against employees who did not support the Union. On this basis, he concurs in finding that Lyons' confrontation with Shackleford does not warrant a new election. Although Member Miscimarra agrees with the multifactor standard set forth in *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984), for determining whether third-party threats warrant setting aside an election, he would abandon the phrase "general atmosphere of fear and reprisal" because it improperly suggests that an election cannot be set aside unless third-party threats affected nearly all eligible voters, no matter how close the tally and how serious the misconduct. See *Mastec Direct TV*, 356 NLRB No. 110, slip op. at 5-7 (2011) (Member Hayes, dissenting) (criticizing *Westwood Horizons Hotel* on this point). Contrary to the implication of the phrase, the Board has in fact properly set aside elections based on serious third-party misconduct affecting only a few determinative voters. See *Robert-Orr Sysco Food Services*, 338 NLRB 614 (2002); *Smithers Tire*, 308 NLRB 72 (1992); *Buedel Food Co.*, 300 NLRB 638 (1990); *Steak House Meat Co.*, 206 NLRB 29 (1973).

Employer's objections do not warrant setting aside the election. See, e.g., *Thiele Industries*, 325 NLRB 1122, 1122 fn. 2 (1998); and *Windsor House C & D*, 309 NLRB 693, 696 (1992).

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for the International Brotherhood of Teamsters, Local 384, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full time and regular part-time drivers, helpers and mechanics employed by the Employer at its Birdsboro, Pennsylvania, Norristown, Pennsylvania, and Downingtown, Pennsylvania locations, but excluding all other employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., December 16, 2014.

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Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

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Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD